

JERSEY / JUDGMENT

Rokos -v- Bevan Howard LP [2014]

JRC 232A (26 November 2014)

[2014] JRC 232A

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judgment

the master:

Introduction

1. This is an application for information brought by the respondent, Brevan Howard (Jersey) LP acting through its general partner BHJ limited ("Brevan Howard"), from the representor Christopher Rokos ("Mr Rokos"). The information is sought either by affidavit verified by supporting documentation or by disclosure of documents and communications in written form, verified by affidavit. Initially the application was made pursuant to Rule 6/17 of the Royal Court Rules 2004 , as amended ("the Rules"). Shortly before the hearing the summons was amended to add in a reference to Rule 6/37 of the Rules. I address later in this decision the powers vested in me by reference to Rules 6/17 and 6/37. Alternatively an order for general discovery was sought.

Background

2. The background to the present dispute including the procedural history is set out at paragraphs 4 to 13 of my decision in this matter reported at Rokos-v-Brevan Howard LP

- [2014] JRC 208 . My earlier decision related to the timing of Brevan Howard's strike out application. I adopt paragraphs 4 to 13 for the purposes of the present application. 3. On 18 th September, 2014, I also determined parts of a discovery application brought by Brevan Howard. Although no detailed reasons were produced in relation to that application, paragraphs 14 to 16 of the Act of Court of 18 th September, 2014, provide as follows:- "14. the requests for discovery contained at paragraphs 1(a) (i), (ii), (iii), (v) and (vi) of the Respondent's Discovery Summons and the request for disclosure in relation to interactions between the Representor and employees of the Respondent are refused;
15. notwithstanding paragraph 14 of this order, the Respondent is permitted, if so advised, to file a further application for discovery in respect of paragraphs 1(a)(v) and(vi) of its Discovery Summons reformulated on a more limited basis;

16. the application for specific discovery at paragraph 1(a) (iv) of the Respondent' Discovery Summons is adjourned to a case management conference on a date to be fixed in the week commencing Monday, 10th November, 2014 with a time estimate of half a day before the Master with liberty to the Respondent to reformulate its application on a more limited basis or to apply for information by way of affidavit." In addition, without making any decision, I gave an indication of the sort of material that might be appropriate to disclose based on what I had heard, as at 18 th September, 2014, in order to try to assist the parties. I also required Brevan Howard to provide discovery of certain legal advice and related communications between the founders of Brevan Howard. This part of my order was subject to the following limitations:- "10. In producing legal advice or any communications relating to or concerning such legal advice pursuant to this order to the Representor, such production is within the confines of privilege, and as such, no waiver of any privilege shall have occurred or be deemed to have occurred by the Respondent or any other entity forming part of the Brevan Howard group by reason of such production;
11. For the avoidance of doubt, the documentation to be produced pursuant to paragraphs 6 to 8 of this order is subject to the usual implied undertaking applicable when one party is required to make discovery to another;
12. Subject to further order of the Court at trial, the nature and extent of the partnership interests or earnings of any of the limited partners of the Respondent including the Representor, and any information concerning Rokos Investments Limited, or any legal advice or communications disclosed pursuant to paragraphs 6 to 8 of this order is strictly private and confidential (and, where applicable, privileged) and shall not form part of the public record of these proceedings and shall not be referred to in open Court." The present application 4. A fair amount of time was spent by the parties prior to the hearing and in their skeleton arguments debating whether Brevan Howard's application was in a more limited form as I had suggested should be the case in paragraphs 15 and 16 of the Act of 18 th September, 2014, set out above. Ultimately the view I have reached is that, given the importance of this dispute to both parties and what is potentially at stake, it is right for me to determine the summons as issued rather than resolving whether it is or is not on a more limited basis. I have reached this view firstly as a matter of principle; if a party issues an application before me, I should determine it including evaluating what is being asked, even if it is not the application that was contemplated or where the other party opposes the application on the basis that it is vexatious or an abuse of process. In the present case I wish to make it clear I am not suggesting that the present application is either vexatious or an abuse of process; rather I am simply explaining how I have approached the summons issued before me. Secondly, the position of the parties has been developing since the last hearing. It would be wrong for me to shut out such developments or ignore the fact that the parties have both refined their arguments and in some parts have reached agreement as to what is relevant for the Royal Court to consider when this matter comes to trial. I would not wish to discourage such discussions. The nature of the application 5. The application, following on from paragraphs 15 and 16 of the Act of Court of 18 th September, 2014, seeks information

by affidavit or disclosure. At the time I made this order, I was not addressed in any detail on whether I had power to do so. In particular, I was not addressed on whether I could require a party to file evidence on a particular topic as distinct from giving permission for a party to file affidavit evidence either generally or on a specific issue. I further observe that, by the Act of 18 th September itself, I merely gave permission for additional affidavit evidence to be filed on a particular topic (see paragraphs 17 and 18). 6. Advocate Speck argued I have power to order both affidavits to be filed and to make orders for discovery. He further contended that his application was for limited general discovery rather than specific discovery. However he accepted that the relevant test was in essence the same, namely were the documents relevant to a matter or matters in issue and was discovery necessary to dispose fairly of the case. Advocate Robinson argued that the application was neither an application for general or specific discovery but rather it was a request for information which was too broad and too vague. If the application did not meet the criteria for discovery, it was also not for the judge to rewrite the application, and in effect to do a party's work for it. A party could also not be required to file an affidavit on a particular issue, but only be permitted to do so. If a party then chose not to file such evidence it was a matter for the court at trial to evaluate the effect of such a position on the particular point in question. Finally, if the application was for interrogatories, interrogatories had not been applied for and therefore any such requests should only be considered on the basis of a properly formulated request. 7. In my judgment, the application is a mixture of an application for documents for evidence to be filed by affidavit on a particular topic and for information. The requests for information in part have the appearance of interrogatories in that they seek discovery of facts. Some are however questions that might be put in cross-examination or seek to require Mr Rokos to advance arguments based on a particular assumption. 8. Insofar as what is sought is discovery, I consider I have power to make such an order. If I consider a request is too widely drawn, I can either refuse the request or order discovery on a more limited basis. Rule 6/17(2) grants me the express power to make an order "limited to documents or classes of documents only, or to such only of the matters in question in the proceedings, as may be specified in the order". I therefore disagree with Advocate Robinson that it is not within my power to reformulate a discovery request that is too widely drawn. If I am satisfied that a narrower category of documents is both relevant and necessary then I consider that I can order disclosure of such documents applying the interests of justice test (see *Nautech Services Limited v Island Information Technology Centre Limited & Anor*

[2014] JRC 143A). Whether I will do so is a matter of discretion vested in me when considering discovery applications and by reference to the case management powers I am permitted to exercise. In my judgment, the days are long gone when how a case might progress can solely be left to the parties themselves, and if the parties have not formulated their application correctly it is no longer the case, if it ever was, that a judge cannot act to progress the matter and grant more limited relief. 9. Insofar as what is sought are interrogatories, I accept that the summons does not seek to invoke Rule 6/16 of the Rules which is the power to order interrogatories and there has been no analysis of when

interrogatories might be ordered or whether the questions put are interrogatories. If Brevan Howard, after this judgment, consider they wish to raise interrogatories in respect of a matter in issue in order to save costs then they will have to make such requests of Mr Rokos (or vice versa) and then apply to me if no agreement is reached. Whether any party does so is a matter for that party and its advisers. I neither encourage nor discourage such an application at this stage. 10. As far as affidavits are concerned, I agree with Advocate Robinson that under the Rules including Rule 6/37 I may only give permission to file affidavits and that if a party does not do so or does so on a limited basis only, the consequences are a matter for the trial court to evaluate. Relevance 11. As submissions developed, it was clear that there was a fundamental disagreement between Advocates Speck and Robinson as to the approach I should take in relation to whether the documents requested were relevant. Advocate Robinson argued that what was requested, putting to one side his other objections, was not relevant to the legal issue the court had to decide; namely whether the restraint of trade doctrine applied to the restrictions contained in the Jersey Partnership Agreement and the Deed signed by Mr Rokos (as defined in my earlier judgment). Advocate Speck argued that the pleadings did raise an issue of whether the restraints would lead to Mr Rokos' skills being affected as well as his remuneration being seriously diminished. Brevan Howard had responded to Mr Rokos' claim by contending that neither his skills nor his remuneration would suffer when he was able to look after his own assets on a full time basis. The amount of assets he was able to manage was not really in dispute between the parties. 12. In reaching my decision, I firstly accept that by reference to the pleadings, there is a factual dispute about whether Mr Rokos' skills will be atrophied or his remuneration affected. The fact that it is Brevan Howard who has alleged that Mr Rokos' skills were not atrophied or his remuneration affected because of the operation of his family office does not matter; it is still a factual dispute on the pleadings. 13. What lay at the heart of Advocate Robinson's argument however was that, as a matter of law, any such factual evidence is irrelevant and therefore his client should not be required to produce any evidence about what are otherwise private and sensitive matters. 14. In support of his argument, Advocate Robinson firstly referred to *A. Schroeder Music Publishing Co. Limited v Macaulay*

[1974] 1 WLR 1308. The case concerned whether an agreement between a music publisher and a song writer was in restraint of trade. At page 1309 Lord Reid stated:- "It is not disputed that the validity of the agreement must be determined as at the date when it was signed and it is therefore unnecessary to deal with the reasons why the respondent now wishes to be freed from it." 15. Advocate Robinson also relied on a quotation from *Gledhow Autoparts Limited v Delaney*

[1965] 1 W. L. R. 1366 where Lord Diplock stated:- "The defendant was in fact employed for over six years by the plaintiffs and no doubt became a valuable servant and acquired considerable knowledge of and personal relation with the plaintiffs' customers. It is natural in those circumstances to tend to look at what in fact happened under the agreement. But the question of the validity of a covenant in restraint of trade has to be

determined at the date at which the agreement was entered into and has to be determined in the light of what may happen under the agreement, although what may happen may cover many possibilities which in the result did not happen. A covenant of this kind is invalid ab initio or valid ab initio. There cannot come a moment at which it passes from the class of invalid into that of valid covenants." 16. Finally, he relied on the fact that Brevan Howard did not dispute the applicable legal tests. In Mourant Ozanne's second letter dated 10 th October, 2014, Advocate Speck stated on page 6:- "You make the point that the reasonableness of what you describe as "the covenants" must be assessed at the time they were entered into. We agree, if the restraint of trade doctrine is of any relevance (which we say it is not)." 17. In the same paragraph of his second letter of th October, Advocate Speck went on to say that the impact of any restrictions "cannot be properly assessed from a purely theoretically standpoint and the respondent has identified Mr Rokos' Family Office as offering him both trading and track record opportunities and a potentially valuable livelihood." 18. Advocate Speck also argued that the factual dispute was for the trial judge to determine and in the meantime I should order Mr Rokos to provide the documents sought. Advocate Speck further argued by analogy with the cases of Prophet Plc v Christopher Huggett

[2014] EWCA Civ 1013 , In Re MF Global UK Ltd (in special administration) (No2)

[2013] EWHC 92 (Ch) and Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co

[1903] AC 426 , that the best evidence of whether a restraint was reasonable, was by reference to what had occurred during any period of restraint that had operated. 19. Finally, Advocate Speck argued that because the legal test included taking into account the legitimate expectations of the parties at the time they entered into the restriction including what was reasonably foreseeable, to divorce looking at what actually happened from what was foreseen led to legal absurdity. 20. I have reached the view that I am required to determine whether the documents requested are relevant. If I was not to form a view that the documents were relevant it would then be incorrect to accede to Advocate Speck's request to leave the matter to trial. This is because I would be ordering production of documents without deciding whether they were relevant. I accept that if the legal test is one that is arguable then I should leave matters to trial and order discovery. In such circumstances it would not fair to refuse discovery on the basis of an arguable legal test as to relevance where there was a clearly a factual dispute. Such issues should be left for the trial judge to determine. 21. In this case the view I have reached is that the legal test is clear by reference to the decisions in Schroeder and Gledhow which I have set out above. It does not therefore matter what happens after a restraint is entered into. By way of illustration, Mr Rokos could have chosen not to have traded at all, or any trading may have incurred significant losses. In fact there is a suggestion in the evidence that Mr Rokos has been successful in administering his assets. None of these scenarios, adopting the approach of Lord Diplock in Gledhow , turn an invalid restriction at the time it was entered into a valid

one or vice versa. The fact that Mr Rokos might be using his skills and might be successful does not therefore matter. What is key is why the restriction was drawn up and what Brevan Howard was seeking to protect when the restraint was agreed. Included within this is what was reasonably contemplated an individual might do when subject to such restrictions. Whether or not an individual chooses to do what he is permitted to do, and if he does, whether he is successful does not matter. Similarly the fact that Mr Rokos wishes to be free of the restrictions also does not matter. The restrictions are either valid or invalid from the moment they were agreed. 22. The Prophet case does not assist because the English Court of Appeal did not make any finding on whether or not a restriction was reasonable because the appeal was allowed based on the court's interpretation of the relevant provision. The MFL Global and Bwllfa cases do not assist either. These cases deal with how the courts assess contingent or unascertained claims. By the time a court comes to assess such a claim, if the contingency has been fulfilled or the claim could actually be ascertained rather than on the basis of a hypothesis, then the actual amount is taken to be the claim's value rather than any estimation. I do not consider these cases in anyway nullify the clear statements of principle in Schroeder and Gledhow . The concession by Brevan Howard in Advocate Speck's second letter of 10 th October, 2014, was therefore rightly made. The consequence of my view is therefore that what happened after the restriction was made is legally irrelevant. This is so even if the parties have already served pleadings or evidence relating to what happened after the agreement was made. In light in this conclusion I am bound to refuse all of the applications listed at paragraphs 1(a) to 1(s) of the Brevan Howard summons. 23. It also follows that I refuse the request for general discovery. What has been ordered to be produced to date, subject to the observations I make in the next paragraph and the counterclaim, is the relevant material to the challenge Mr Rokos has brought. This allows the Court, subject to hearing a strike out application first if it wishes to do so, to have before it the relevant material that led to the restrictions that are now challenged. I am not persuaded that a general discovery order will add anything significant to the issues between the parties when what is needed is a ruling on the validity of the restraints. Such an order also runs the risk of delaying the earlier trial of a matter that I continue to treat as a cause de brevete . Finally, as I am not persuaded to order the more limited categories of documents sought in respect of the claim, it would then be inconsistent to make a general discovery order. 24. I do wish to observe that the affidavit evidence to date has focussed on why the restrictions were entered into, rather than what anyone including Mr Rokos might do during the period of restraint. The discovery I have ordered to date may cover this issue by reference to paragraphs 6 to 8 of the Act of Court of 18 th September, 2014. If, however, the searches carried out did not extend to what was reasonably foreseeable that an individual subject to the restraints might do then, they should. 25. It is also right to record that both in court and at paragraph 27 of Advocate Robinson's skeleton argument, Mr Rokos accepted that he was not seeking to rely on issues of skill atrophy or livelihood as a reason why the Royal Court should not grant an injunction should his case of restraint of trade prove unsuccessful. The skeleton stated:- "If the Royal Court decides that the restrictions are enforceable, the Representor

will comply with them." 26. The relevance of this concession is that evidence is not required on what Mr Rokos has been doing since the restraints were agreed which would otherwise go to whether or not the court as a matter of discretion should grant an injunction requiring Mr Rokos to abide by the restrictions. In this case the position is clear. If Mr Rokos' challenge to the restrictions fails, he will abide by them. This is the basis upon which the trial is proceeding. Disclosure or evidence in relation to whether or not an injunction is needed is not therefore required. 27. I also wish to make it clear that, but for the view I have reached on legal relevance, I would have made certain orders in relation to the factual issues that are in dispute on the pleadings. Firstly, I would have required Mr Rokos to disclose the capital value of assets invested or managed by him as described at paragraph 77 of his second affidavit on dates to be selected by him between his resignation from Brevan Howard and the date he commenced proceedings, or failing such selection on 31 st December, 2012, 31 st December, 2013, and 30 th June, 2014. I would have required him to produce sufficient disclosure to verify independently the capital value of such assets including any capital sums added to or withdrawn between the dates in question. Such discovery would have also extended to a breakdown of assets invested using the headings equities, swaps, bonds, cash, foreign exchange and other categories of investment, indicating the percentages each category represented of the total amount under investment. I would have only required sufficient disclosure to enable these percentages to have been verified without requiring full disclosure. I consider that such disclosure would have been sufficient to evaluate whether Mr Rokos' earnings were being seriously diminished or his skills atrophied. The applications otherwise went too far and were seeking a level of detail that was not necessary to enable the Jurats to form a view on the issues of skill atrophy and whether any remuneration was being affected. While I accept the confidentiality of such information is not a basis alone to refuse disclosure, confidentiality can be taken into account in limiting disclosure to only what is necessary (see Lord Keith in *Harman v Home Office*

[1983] 1 A. C. 280 line B to 309 line A and Lord Wilberforce in *Science Research Council v Nasse*

[1980] AC 1028 at 1067 line E). 28. I would also have given permission to Mr Rokos to file additional evidence in respect of paragraphs 1(f)(g)(k)(l)(m) and (n) of the summons and the tax considerations said to impact on Mr Rokos' investments arrangements implicitly referred to in paragraph 1(h) and expressly offered by Bedell Cristin's letter of 8 th October, 2014. The remaining requests are either not necessary (paragraphs 1(c),(d),(e) and (j)), amount to cross-examination, (paragraphs 1(i)(p)(q) and (r)), or are requests to Mr Rokos to respond to arguments Brevan Howard wish to advance (paragraphs 1 (f) and (s) or are not current facts (paragraphs (j) and (o)). 29. Finally I am sympathetic to the parties if they wish, within an agreed timetable as long as the trial dates are not jeopardised, filing further affidavit evidence on what was reasonably foreseen an individual might do during the period of restraint. I leave it to the parties' advisers to consider this further in light of this decision and to revert to me if there are any issues that cannot be resolved. The counterclaim 30. Brevan Howard also seek discovery in relation to their counterclaim. The

counterclaim arises out of an exchange of letters between Brevan Howard and Mr Rokos dated 17 th February and 20 th February, 2014. On the basis of this exchange, Brevan Howard paid certain allocations of profit to Mr Rokos in respect of the calendar year ended st December, 2013, and authorised the release of certain other sums which were due to vest in March 2014. 31. On 11 th April, 2014, MacFarlanes on behalf of Mr Rokos wrote to Brevan Howard's English Solicitors, Simmons & Simmons, notifying Brevan Howard of Mr Rokos' intention to establish his own fund and explaining that Mr Rokos and MacFarlanes considered the restrictions to be unenforceable and therefore Mr Rokos did not believe himself to be bound by them. The letter of 11 th April, 2014, was disputed by Messrs. Simmons & Simmons on behalf of Brevan Howard in their reply dated 28 th April, 2014. 32. This exchange of letters ultimately led to the present proceedings including a counterclaim by Brevan Howard. Paragraphs 43 to 45 of the answer and counterclaim of Brevan Howard contain the material averments in respect of the counterclaim as follows:- "43. The Respondent repeats paragraph 37 hereof and infers that the Representor must have been well aware of Macfarlanes' intention to write the said letter and of his wish to challenge the validity and enforceability of the Clause 8.1 Obligations when writing the February Letter and, by so acting, was in breach of his duties under clause 22.2 of the LP Agreement and/or clause 8.1(A) of the Deed. In the further alternative, the Respondent avers that, in breach of his said duties, the Representor failed to advise the Partnership of his change of mind prior to payment of the sums referred to in paragraphs 39 and 40 hereof. 44. In the yet further alternative to paragraph 43 hereof, the Respondent avers that, on its true construction, the February Letter contained a representation that the Representor had no intention of establishing his own investment fund and/or of challenging the validity and enforceability of the Clause 8.1 Obligations, which said representation was false and misleading in that the Representor must as at the th February, 2014, have had the same intentions as were set out in Macfarlanes' letter less than two months later. The Partnership was entitled to rely and did rely on the said representation when making the payments pleaded in paragraphs 39 and 40 hereof. 45. If the Partnership had been aware of the true position it would have had the ability to consider the options open to the General Partner by reason thereof, including in particular conducting further investigations into the activities and intentions of the Representor, negotiating with the Representor and/or withholding payment of all or part of the said amounts (whether by way of set off in respect of a prospective claim to damages or otherwise)." 33. Paragraph 45 leads to a claim for loss and damage representing payment of all sums which could have been withheld by way of set off or alternatively representing loss of opportunity to consider options that might have been open to Brevan Howard. 34. In the summons returnable before me on 18 th September, Brevan Howard sought the following orders in relation to the counterclaim:- "(v). The circumstances in which the Representor came to write the letter of 20 th February, 2014, including but not limited to the legal advice received from MacFarlanes on the restrictive covenants at Clause 8.1 of the Deed of Allocation notwithstanding any right of the Representor to withhold inspection on the basis that the discoverable documents are privileged; (vi). The

exploration by the Representor of the possibility of establishing his own investment fund and fund manager in London after 1 st July, 2014, as described by MacFarlanes in their letter to Simmons & Simmons dated 11 th April, 2014." 35. By reference to paragraph 14 of the Act of Court of 18 th September, 2014, these requests were refused but Brevan Howard were given liberty to make a further application for discovery in respect of the request that been refused on a more limited basis. 36. What Brevan Howard now seek is as follows:-

"(t). Confirmation that none of the Representor, the Family Office any other entity through which the Representor might choose to carry on business at any time since 1 st September, 2012, solicited or secured any commitment to third party funds. (u). An explanation of when the Representor first formulated his wish to establish his own investment fund and fund manager in London and took positive steps to explore the viability of the same. (v). An explanation by reference to a privilege log identifying the date of each privileged written communication and the addressee but not disclosing the content of when the Representor took legal advice as to validity or enforceability of the Clause 8.1 obligations (as defined in the Answer). (w). Details of the engagement of any external advisers other than MacFarlanes LLP engaged between 1 st September, 2012, and 11 th July, 2014, by or on behalf of the Representor or the Family office to advise on or assist in the establishment of his proposed investment fund and fund manager and the nature of the advice sought and the date of the same (save in the case of any privileged material by reference to a privilege log of the type described in (v) above)). (x). The like details of any advice, views or commentary provided between 1 st September, 2012, and 11 th July, 2014, by any other third party (including from within the Family Office) regarding such matters as described in (w)above) or as to the Representor's ability to attract quality talent to his proposed investment fund and fund manager." 37. Advocate Speck's submission was in summary that the counterclaim was an arguable case which required disclosure. The case is pleaded and has not been struck out. Having heard Advocate Robinson he in fact contended the case was a strong one. His fundamental concern was that he had no documents in order to test the assertions put forward by Mr Rokos. He emphasised that confidentiality was no bar to providing the material requested. 38. Advocate Robinson argued that what was sought was not more limited and was as widely drawn as before and therefore it was open to me to dismiss the summons. He regarded the application as a fishing expedition which was not part of the pleaded case. He also reminded me that Mr Rokos was entitled to take preparatory steps to establish a fund. Brevan Howard was not entitled to know what those preparatory steps were. The claim was weak and this should be weighed in the balance in deciding how to approach the application. 39. He further contended that the request for legal advice was still seeking privileged information because to ask whether an individual took advice on a particular subject is itself privileged. He relied on remarks of Lord Bingham in *R v Manchester Crown Court ex parte Rogers*

- [1999] 1 WLR 832 at 839 where Lord Bingham in ordering a log of privileged communications stated:- "Production is sought of nothing relating to legal advice or the subject matter of legal advice. Any such reference in, for example, an attendance note can be covered up, blacked out or obliterated." 40. In *Financial Services Compensation Scheme Limited v Ants*
- [2007] EWHC 2868 (Ch) David Richards J. stated:- "If a client writes to his lawyer in terms asking for advice on a particular question, the communication is privileged." Decision on the Counterclaim 41. I start by reference to the requests as now formulated by the Brevan Howard. Request (t) is new and was not raised in the original summons. Request (u) is also in effect new although in my judgment it is in part a reformulation of request 1(v) of the original summons which was refused. The part that seeks an explanation of when Mr Rokos took positive steps to explore the viability of a new fund is a repetition of request 1(vi) albeit in more detail. Request (v) for a privilege log is new as is request (x). Other than no longer seeking MacFarlanes' advice, the present summons therefore goes at least as far as the requests that were refused and some parts go further. This was not what was contemplated by me when I made the orders contained at paragraph 15 of the Act of Court of 18 th September, 2014. 42. However, as the summons has been issued, as set out above I will deal with the application as presented before me. 43. Starting first with request (t), this is a request for a confirmation that Mr Rokos has not been soliciting third party funds. This is not an issue raised on the pleadings. There is also no evidence of any such solicitation. It is the sort of order I would expect to see had Brevan Howard advanced a case of a breach of the restrictions with evidence. It is not an uncommon provision inserted as part of injunctions being granted. However, in the absence of any evidence of any such breach and the lack of any such assertion in any of the pleadings, this request is a fishing expedition and is refused. 44. I next deal with the request for a privilege log contained at request (v). I agree with Advocate Robinson that this is a request for privileged information. A party should be free to talk to his advisers and other than the fact that he has retained advisers, any other party is not entitled to know anything about that communication while the cloak of privilege applies. There is no suggestion in this case that privilege does not apply. The log asked for therefore seeks information that is privileged in which must have been known to those advising Brevan Howard. 45. In relation to requests (u) and (w) their relevance needs to be ascertained by reference to paragraphs 43 and 44 of Brevan Howard's answer and counterclaim. What is at the heart of these paragraphs is an assertion that, at the time Mr Rokos wrote his letter of 20 th February, 2014, he had changed his mind and intended to set up a fund in competition with Brevan Howard. The key provision is clause 2.4 of the letter which provides as follows:- "There are no applications for regulatory approvals in any jurisdiction to commence investment management activities pending for RIL (or any other entity out of material interest) and no such applications are currently being considered or proposed ." (emphasis added) 46. In my judgment there is a factual issue as to whether applications for regulatory approvals were being considered or proposed. In particular, there is an argument that any such considerations or proposals other than under the cloak

of privilege were contrary to the statements made at clause 2.4 on 20 th February, 2014. On the other hand such steps may be no more than Mr Rokos doing what he was permitted to do by reference to the terms of the partnership agreement and the deed of allocation he signed. 47. I consider the key issue at the heart of the counterclaim is what was Mr Rokos considering or proposing as at 20 th February, 2014, in relation to establishment of an investment fund or a fund manager. While I accept that he was permitted to take preparatory steps, he has made a statement as at 20 th February which Brevan Howard now challenges as to its accuracy. It is a matter for trial as to how to resolve this dispute. The view I have reached therefore is that any advice from external advisers, other than lawyers, being considered or being put to Mr Rokos as at 20 th February, 2014, including the nature of such advice should be disclosed. Such advice is relevant to the factual dispute raised by the counterclaim. This disclosure is also necessary as it allows Brevan Howard to test whether the statement made in clause 2.4 was a mis-representation. What I consider should be disclosed are any communications between 15 th July, 2013, when Rokos Investments Limited was established and 20 th February, 2014, being the date of the alleged representation between Mr Rokos, Rokos Investments Limited or any other company in which Mr Rokos had a material interest in 20 th February, 2014, in relation to the establishment of a proposed investment fund and fund manager. I also consider that Mr Rokos should produce any written communications between 15 th July, 2013, and 20 th February, 2014, sent by him or received by him from anyone within the Rokos Family Office, including Rokos Investments Limited concerning the establishment of a proposed investment fund or a fund manager. I consider that such disclosure is sufficient to enable Brevan Howard to test the denial of paragraphs 43 and 44 of the answer and counterclaim. 48. I consider this disclosure is sufficient to deal with requests (u), (w), and (x) of the summons. To require disclosure above and beyond the information I have ordered to be disclosed goes too far. It is not necessary to resolve the counterclaim and could set Mr Rokos and those advising him on an extensive task disproportionate to the issue raised by the counterclaim. 49. This disclosure is made on the same basis as the disclosure of legal advice to be provided by Brevan Howard as reflected at paragraph 12 of the Act of Court of 18 th September, 2014. 50. Subject to hearing from the parties I propose that such disclosure is made by close of business Friday, 19 th December, 2014. At the same time I give liberty to Mr Rokos to file an affidavit if he so chooses setting out any evidence he wishes to give in relation to the material I have ordered that he disclose. I have given such permission in light of the submission that Mr Rokos was entitled to undertake preparatory steps. I therefore consider it fair to allow him an opportunity to set out his evidence that any material produced amounted to preparatory steps only.

Conclusion

51. In conclusion for the above reasons:- (i) I dismiss parts 1(a) to (s) of Brevan Howards' summons because such information is not legally relevant. (ii) I order Mr Rokos to provide discovery of all written communications between 15 th July, 2013, and 20 th February, 2014, in relation to the establishment of an investment fund or a fund manager
- (i) with external advisers other than lawyers and (ii) sent by him or received by him from members of his family office, such discovery to be provided by 19 th December, 2014. (iii) Subject to any other order the trial judge may make, any such disclosure is strictly private and confidential and shall not form part of the public record of these proceedings and shall not be referred to in open court. (iv) Permission is given to Mr Rokos to file an affidavit relating to any material I have ordered him to produce, which affidavit is also strictly private and confidential, such affidavit to be served and filed by 19 th December, 2014. Authorities Royal Court Rules 2004, as amended. Rokos-v-Brevan Howard LP

[2014] JRC 208 . Nautech Services Limited v Island Information Technology Centre Limited & Anor

[2014] JRC 143A . A. Schroeder Music Publishing Co. Limited v Macaulay [1974] 1 WLR 1308. Gledhow Autoparts Limited v Delaney

[1965] 1 W. L. R. 1366. Prophet Plc v Christopher Huggett

[2014] EWCA Civ 1013 . In Re MF global UK Ltd (in special administration) (No2)

[2013] EWHC 92 (Ch) . Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co

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